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No. 82-923

IN THE

Supreme Court of the United States

October Term, 1982

NORTHWEST EXCAVATING, INC.,

Petitioner,

vs.

WILLIAM C. WAGGONER, *et al.*, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

WAYNE JETT*,
JETT, CLIFFORD & LAQUER,
3055 Wilshire Boulevard,
Suite 420,
Los Angeles, Calif. 90010,
(213) 380-2082,
Counsel for Respondents.
**Counsel of Record.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented.

Whether a federal court, in an action brought under Section 301 of the Labor Management Relations Act, may consider or apply both state law and related federal statutes which authorize an award of attorney's fees to the prevailing party in a breach of contract action?

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BRIEF IN OPPOSITION.

Respondents pray that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1982, be denied.

Statutes Involved.

This case involves Section 301(a) of the Labor Management Relations Act of 1947 ("LMRA"), 61 Stat. 156, 29 U.S.C. § 185(a), Section 502(g) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 94 Stat. 1295, 29 U.S.C. § 1132(g), and California Civil Code Section 1717.

Section 502(g)(1) of ERISA provides as follows:

> "In any action under this title *(other than an action described in paragraph (2))* by a participant, beneficiary, or fiduciary, the court in its discretion may allow

a reasonable attorney's fees and cost of action to either party." (Emphasis added.)

The portion of the statute given emphasis above is erroneously omitted from the text of the statute set forth in Appendix A of the petition. (Pet. App., p. 1.)

Statement of the Case.

This case arose when respondents, as trustees of four labor-management employee benefit trusts ("Trustees"), brought suit against petitioner Northwest Excavating, Inc. ("Northwest") seeking recovery of delinquent fringe benefit contributions. Contributions were claimed to be due from Northwest based on the employment duties of a workman (Sandoval) and his helpers who performed equipment maintenance and repair for Northwest. In addition, contributions were claimed to be due on work performed by "owner-operators" furnished by Northwest to operate heavy equipment on construction jobsites.

The rights of the Trustees to receive payments from Northwest arise under the Mastor Labor Agreement between the Southern California General Contractors Associations and the International Union of Operating Engineers, Local Union No. 12 ("Local 12"), to which Northwest is bound as an employer association member. With certain irrelevant exceptions, the Master Labor Agreement requires that all equipment maintenance and repair work be performed by employees of the signatory contractor (*i.e.*, Northwest). The district court concluded that Northwest had breached the Master Labor Agreement by subcontracting maintenance and repair work to Sandoval as an independent contractor, and awarded damages to the Trustees in the amount of contributions which would have been payable absent the breach.

Further, the Master Labor Agreement requires the "Contractor" (expressly defined as the employer signatory to the Master Labor Agreement) to make each owner-operator a *bona fide* employee and to pay the owner-operator by separate checks for wages and for equipment rental. The Master Labor Agreement expressly prohibits any scheme or device to circumvent these requirements concerning coverage of owner-operators. However, viewing the Master Labor Agreement as unambiguous and requiring no extrinsic evidence of intent in this respect, the district court ruled that Northwest could act as a "broker" for owner-operators without violating the Master Labor Agreement. The ruling of the district court permitted Northwest to treat the owner-operator as an independent contractor and bill each of Northwest's customers for the services of the owner-operator, then pay the owner-operator the amount collected, less a percentage commission fee of 7%, without violating the Master Labor Agreement.

The district court found no violation of § 8(e) of the National Labor Relations Act (the "Act") [29 U.S.C. § 158(e)], as alleged by Northwest, in the Master Labor Agreement provisions relating to the maintenance and repair work performed by Sandoval. The district court declined to award attorney's fees either to the Trustees or to Northwest, although the Master Labor Agreement provides that the Trustees are entitled to recover the attorney's fees incurred in collecting delinquent amounts.

The Court of Appeals affirmed the district court's ruling that Northwest breached the Master Labor Agreement by subcontracting maintenance and repair work to Sandoval, and affirmed the award of damages to the Trustees. The Court of Appeals initially declined to entertain Northwest's defense that the maintenance and repair provisions of the Master Labor Agreement violate § 8(e) of the Act. How-

ever, after its original decision was vacated and the case remanded by this Court for further consideration in light of *Kaiser Steel Corporation v. Mullins*, 455 U.S. ___, 102 S.Ct. 851 (1982), the Court of Appeals considered the merits of the § 8(e) defense and affirmed the district court's conclusion that no § 8(e) violation had occurred. Northwest's petition does not challenge this ruling by the Court of Appeals.

On the Trustees' appeal, the Court of Appeals affirmed the district court's conclusion that Northwest treated the owner-operators as independent contractors rather than employees. (Pet. App., p. 19.) Considering the interpretation of the Master Labor Agreement provisions concerning owner-operators to be a question of law subject to *de novo* review, the Court of Appeals adopted the district court's view that the Master Labor Agreement permits Northwest to act as a "broker" and to deal with the owner-operators as independent contractors without making each owner-operator its *bona fide* employee. (Pet. App., pp. 20-21.)

Finally, the Court of Appeals ruled that the Trustees were entitled to enforce their rights under the Master Labor Agreement to recover liquidated damages, audit expenses and attorney's fees incurred in the suit against Northwest, but that no statutory or contractual authority exists for an award of attorney's fees to Northwest in the case. (Pet. App., pp. 23-25.) These aspects of the first decision of the Court of Appeals were reaffirmed without further comment in the second decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT.

I.

The Petition Fails to Present a Justiciable Issue.

Northwest seeks a ruling by this Court that § 301 of the LMRA authorizes federal courts to consider "both state law and related federal statutes" as grounds for adopting a "mutuality principle" by which attorney's fees could be awarded to the prevailing party whenever either party has a contract right to recover such fees. Although that premise is erroneous, as will be shown, the ruling sought by Northwest would not enable Northwest to recover attorney's fees in this case. Therefore, Northwest has no justiciable interest in obtaining a ruling on the issue.

Specifically, Northwest seeks application of California Civil Code § 1717, which authorizes award of attorney's fees to the "prevailing party" in a breach of contract action when the contract entitles either party to recover attorney's fees. However, the language of § 1717 expressly states that " 'prevailing party' means the party in whose favor final judgment is rendered." (Pet. App., p. 2.) Final judgment in this case was entered in favor of the Trustees. (Pet. App., p. 11.) That judgment was affirmed by the Court of Appeals, and Northwest no longer contests the validity of that ruling. Accordingly, even if § 1717 were applied in this case, Northwest could not recover its attorney's fees.

Although Northwest argues only for the adoption of a "mutuality principle" and not for a rule allowing "discretionary" awards of attorney's fees to either party, even a discretionary rule similar to those cited by Northwest as applicable in other types of actions [§ 502(g) of ERISA and § 4301(e) of the Multiemployer Pension Plan Amendments Act] (Pet. App., p. 7) would not avail Northwest in this

case. The district court in this case specifically declined to award attorney's fees to Northwest.[1]

Since neither a "mutuality principle" nor a discretionary rule authorizing attorney's fees awards in § 301 actions would benefit Northwest in this case, the issue is merely hypothetical and does not amount to a controversy "touching the legal relations of the parties." *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 57 S.Ct. 461 (1937). If "a controversy [is] to be justiciable, the court must be able to afford effective relief"; a ruling that could not enable Northwest to recover attorney's fees in this case would be "simply an advisory opinion." *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 45 (2nd Cir. 1976); *affirmed sub nom. Northeast Marine Terminal Company v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348 (1977).

II.

Federal Courts May Not Fashion a Rule Applicable to Section 301 Suits Authorizing an Award of Attorney's Fees to the Prevailing Party Under a "Mutuality Principle" as Urged by Northwest.

The petition correctly asserts that the Court of Appeals rejected the application of state law as a basis for awarding attorney's fees to Northwest in this Section 301 suit, but *incorrectly* asserts that state law was rejected in order to "create a uniform national attorney's fees rule in Section 301 actions." (Pet., p. 6; *cf.* Pet. App., pp. 23-24.) To the contrary, the Court of Appeals rejected both the application of state law and the alternative argument that Northwest

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[1]The district court's determination that Northwest is not entitled to recover attorney's fees is made as a finding of fact, rather than as a conclusion of law (Pet. App., p. 7), demonstrating that the denial of attorney's fees to Northwest resulted from an exercise of discretion by the district court.

now makes to this Court: that "the mutuality principle embodied in California Civil Code Section 1717 [by which the 'prevailing party' may be awarded attorney's fees if either party has a contract right to recover such fees] is consonant with the explicit congressional design behind the national labor laws" (Pet., p. 7), and "should be imported [sic] in federal labor law . . ." (Pet., p. 9.)

As the Court of Appeals recognized, this Court's holding in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612 (1975), precludes federal courts from applying state law or fashioning a federal rule based on policy arguments as a basis for awarding attorney's fees to a party in a suit arising under federal law. In *Alyeska Pipeline*, this Court stated:

> "Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorney's fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorney's fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.*, 421 U.S. at 269, 95 S.Ct. at 1627.[2]

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[2]The Court had already noted that the practice of applying state law as authority for awarding attorney's fees in suits arising under federal law was discontinued in 1853 by Congressional legislation. *Id.*, 421 U.S. at 250-53, 95 S.Ct. at 1618-19.

Moreover, in rejecting the request of the Wilderness Society that the Court embark on a course of adopting judicially created law authorizing awards of attorney's fees, this Court raised rhetorically several questions which would inevitably be confronted if the Court were to acquiesce in following that path. One of the questions was whether the courts should then "opt for awards to the prevailing party, whether plaintiff or defendant, or only to the prevailing plaintiff?" *Id.*, 421 U.S. at 263-64, 96 S.Ct. at 1625.

The petition fails entirely to discuss the controlling effect of this Court's decision in *Alyeska Pipeline*. Instead, the petition cites the inapposite decision of this Court in *International Union v. Hoosier Cardinal Corporation*, 383 U.S. 696, 86 S.Ct. 1107 (1966), which deals with selection of the appropriate statute of limitations to be applied in § 301 suits (and concluding that the appropriate state statutes of limitations should be applied). The decision in *Hoosier Cardinal* does not detract in any way from the holding of *Alyeska Pipeline*.

Otherwise, the petition merely states its own views of policy arguments supporting adoption of the "mutuality principle" proposed for adoption and application in § 301 suits. The Court of Appeals rejected those arguments, stating:

> "We read *Alyeska* . . . as imposing strict limits on the use of state law to support attorney's fees awards. Those limits were not overborne by the federal environmental policies asserted by the Wilderness Society in *Alyeska*. Nor are those limits overborne by the policies asserted by Northwest in this case." (Pet. App., pp. 23-24.)

The Court of Appeals then proceeded to note that the federal law applicable in § 301 suits includes strong policies favoring uniformity in the law applicable to interpretation and enforcement of collective bargaining agreements, and favoring enforcement of the contract as agreed by the parties, rather than as modified by state statutes. Both of these policies run counter to Northwest's arguments.

Additional policy concerns are that the "mutuality principle" proposed by Northwest "would discourage trust funds from pursuing potentially valuable claims against employers for delinquent payments for fear that the liability for attorney's fees might outweigh the benefits", and that

the awards made under such a rule "would inevitably diminish the amount in the trust fund available for the benefit of employees." *Burke v. French Equipment Rental, Inc.*, 498 F.Supp. 94, 101 (C.D. Cal. 1980); *affirmed in pertinent part*, 687 F.2d 307, 312 (9th Cir. 1982). These were among the policies underlying the recent enactment of § 515 of ERISA, 94 Stat. 1295, 29 U.S.C. § 1145, establishing a statutory duty to pay fringe benefit contributions due under collective bargaining agreements, and the revision of § 502(g) of ERISA (*supra*, pp. 1-2, and Pet. App., pp. 1-2) making mandatory the award of attorney's fees and other amounts to employee benefit plans when such plans have recovered delinquent contributions, but making no provision for awarding attorney's fees to employers who successfully defend such suits for delinquent contributions.

III.

If the Court of Appeals Had Not Erred in Construing the Master Labor Agreement, Northwest Would Not Have Prevailed on Any Issue and Could Not Claim Entitlement to Attorney's Fees.

The only issue on which Northwest prevailed in the Court of Appeals involved interpretation of the Master Labor Agreement provisions governing use of owner-operators. The Master Labor Agreement requires the "Contractor" (expressly defined as the employer signatory to the Master Labor Agreement) to make each owner-operator a *bona fide* employee and to pay the owner-operator by separate checks for wages and for equipment rental. The Master Labor Agreement specifically prohibits "any scheme to defeat the terms" governing owner-operators. The Master Labor Agreement makes no provision for the signatory employer to act as a "broker" for owner-operators. Yet the Court of Appeals, on *de novo* review of the Master Labor Agree-

ment provisions, affirmed the district court's view that Northwest could act as a "broker" for owner-operators, receiving full compensation from whatever customer Northwest's owner-operator serves, then deducting a seven percent "brokerage commission" before transmitting the remaining compensation to the owner-operator. (Pet. App., pp. 20-21.) The district court ruled that only the "general contractors" for whom Northwest furnished owner-operators have the obligations under the Master Labor Agreement to treat the owner-operators as their *bona fide* employees (Pet. App., pp. 6, 9-10.) Of course, the "general contractors", even if signatory, could not possibly abide by the Master Labor Agreement by treating the owner-operators as employees, paying separate checks for wages and for equipment rental and paying contributions to the Trusts, while at the same time paying the entire compensation to Northwest for deduction of a "brokerage commission" before transmittal to the owner-operator.

Properly construed, the Master Labor Agreement requires Northwest to treat owner-operators as its employees and to pay related contributions to the Trustees. With a correction of this error, Northwest would prevail on no issue, and would have no basis for claiming entitlement to attorney's fees on any theory.

Conclusion.

Based on the foregoing, the petition for a writ of certiorari should be denied.

Dated: December 13, 1982.

Respectfully submitted,

WAYNE JETT,*
JETT, CLIFFORD & LAQUER,
Counsel for Respondents.
**Counsel of Record.*